UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 6, 1997

FREDERICK JOHN HARRIS,	)	
	)	
Complainant	)	8 U.S.C. 1324b Proceeding
	)	
	)	OCAHO Case No. 96B00034
vs.	)	
	)	
	)	
STATE OF HAWAII, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT and DEPARTMENT OF HUMAN SERVICES,	)	
	)	
Respondents	)	

ORDER DISMISSING COMPLAINT WITH PREJUDICE

I. Background

On March 12, 1996, Frederick J. Harris (complainant), a Canadian national who received United States citizenship on January 10, 1996, filed a complaint against the State of Hawaii, Department of Human Resources Development and Department of Human Services (respondents), in which he alleges that on or about March 24, 1995, in the course of applying for an income maintenance worker I (IMW I) vacancy within the Department of Human Services, respondents discriminated against him based on his national origin and citizenship status, and retaliated against him for having asserted rights protected under 8 U.S.C. § 1324b.[1]

Complainant alleges that in having done so, respondents violated pertinent provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1324b(a)(1) and (a)(5). Complainant seeks an order directing the respondents to hire him as an IMW I and an award of money damages in the form of back pay from on or about May 24, 1995.

[1] In the complaint, complainant erroneously listed the position at issue as social services assistant IV.

On May 31, 1996, complainant filed a motion seeking summary decision on the basis that respondents failed to file a timely answer. An order denying that motion was issued on July 30, 1996.[2]

On September 9, 1996, complainant requested a stay of proceedings for a period of 90 days, or until December 9, 1996, because of his required absence from the United States. That request was granted.

On December 16, 1996, complainant telefaxed a letter to this Office to request appointment of counsel, to be paid by the federal government, since he no longer had the personal resources to prosecute his claims further or to hire counsel. He also advised that he would move to voluntarily dismiss the complaint without prejudice to refiling in the event his request for counsel were to be denied.

For the reasons set forth below, those requests are being denied and the complaint dismissed with prejudice to refiling.

II. Discussion

On December 16, 1996, complainant telefaxed a letter to this Office advising that he was financially unable to prosecute his claims further and requested that counsel be appointed for him at the government's expense. He also included allegations against the respondents to the effect that he had been compelled to leave the United States because of respondents' discriminatory practices, and advised that he would seek voluntary dismissal without prejudice to refiling in the event that his request for counsel were to be denied. Some of the more relevant portions of that letter are reproduced here:

> . . . the plain fact of the matter is that I am a United States citizen who has been driven from the United States to my country of origin by the discriminatory employment practices of the [respondents] . . .
>
> . . . I no longer have the personal resources either to prosecute further these matters or to obtain legal counsel to assist me so that the matters can be heard . . .
>
> . . . I respectfully request that the honorable court consider [my] complaint on the basis of the information I have provided to date and on that basis decide whether the U.S. Department of Justice

[2] See Order Denying Complainant's Motion for Summary Decision dated July 30, 1996 for a complete discussion of the procedural history prior to complainant's motion for summary decision.

> will authorize the complainant to engage competent legal counsel whose professional fees are to be paid for by the United States government . . . absent legal counsel I will be compelled to file a Motion to the Court where I will request dismissal without prejudice . . . with the related costs to be borne by the respective parties . . .

It is noted that these requests and allegations were made without having provided notice to the respondents, as required under the procedural rules. See 28 U.S.C. § 68.36. Complainant's pro se status would normally allow application of less stringent standards in judging violations of specific procedural rules, and an admonition to avoid future infractions. However, throughout this proceeding complainant has shown that he fully understands the procedural rules and his obligation to comply with them. Accordingly, complainant's requests are deemed prohibited ex parte communications and appropriate sanctions may be imposed.

This rule is necessary because ex parte communications between one of the parties to an adjudication and the decision maker deprives the other side of an opportunity to rebut ex parte arguments and evidence. The United States Court of Appeals for the Ninth circuit has stated that absent some compelling justification, ex parte communications will not be tolerated and are anathema in our system of justice. Guenther v. Commissioner of Internal Revenue, 889 F.2d 882, 884 (9th Cir. 1989).

The procedural rule provides in pertinent part:

> A party or participant who makes a prohibited ex parte communication . . . may be subject to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and adverse ruling on the issue which is the subject of the prohibited communication. (emphasis added)

See 28 C.F.R. § 68.36(b). Accordingly, the requests made in complainant's ex parte communication are hereby denied. Had the request for an attorney been properly made, neither OCAHO regulations nor constitutional due process would require that counsel be appointed at government expense. See 28 C.F.R. § 68.33(b); United States v. Carpio-Lingan, 6 OCAHO 871, at 3 (1996).

III. Complainant's Discrimination Claims

A consideration of complainant's claims is now in order to determine whether dismissal of this action is appropriate or whether an evidentiary hearing shall be necessary. For purposes of making these rulings, complainant's claims shall be subject to scrutiny under the standard for summary decision, which is appropriate if the pleadings, affidavits, documentary evidence or matters officially noticed show that there is no genuine issue as to any material fact and that a

party is entitled to summary decision. See 28 C.F.R. § 68.38(c). In connection with complainant's May 31, 1996 summary decision motion, both parties submitted briefs, affidavits and documentary evidence setting forth their respective arguments.

A. National Origin Discrimination

OCAHO has jurisdiction over national origin claims only where the employer has more than three (3) but less than 15 employees. See § 1324b(a)(2)(B). In the event the employer has 15 or more employees, a claim of national origin discrimination must be filed with the Equal Employment Opportunity Commission (EEOC). The burden of demonstrating that OCAHO has jurisdiction is placed on the complainant at all times, and cannot be waived by either party. An administrative law judge may, sua sponte, raise and decide whether jurisdiction is appropriate.

In his original charge filed with OSC, dated August 30, 1995, complainant alleged that he was unable to estimate the number of employees respondent employed, nor has he since pleaded or produced evidence demonstrating that OCAHO has jurisdiction. It is quite clear that complainant cannot meet this burden because it is found, as a matter of official notice, that the State of Hawaii, as the real party in interest, employs well over 14 employees. See 28 C.F.R. § 68.41.

Accordingly, complainant's national origin claim is dismissed with prejudice because OCAHO lacks jurisdiction over that claim.

B. Citizenship Status Discrimination

To establish a prima facie case of citizenship status discrimination, complainant must show that: (1) he is a member of a protected class; (2) the employer had an open position for which he applied; (3) he was qualified for the position; and (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship. Lee v. Airtouch Communications, 6 OCAHO 901, at 11 (1996).

At the time complainant applied for the IMW I vacancy, he was a permanent resident of the United States, having obtained that status on December 28, 1989. Complainant applied for naturalization on December 28, 1994. Therefore, complainant has established that he is a protected individual under IRCA, thus satisfying the first element of his prima facie case. See 8 U.S.C. § 1324b(a)(3).

With regard to the second element, there is no dispute that the respondents were seeking qualified applicants to fill IMW I vacancies, thus satisfying that element as well.

To determine whether complainant has satisfied the third and fourth elements of his prima facie case a more searching inquiry shall be conducted.

Respondents have provided the affidavit of Renee K.T. Chang, the Chief of the Recruitment and Examination Division, Department of Human Resources Development (DHRD), sworn to on June 10, 1996, clearly setting forth the recruiting process of the State of Hawaii, and for the IMW I vacancies in particular.

The DHRD serves as the central personnel agency for the civil service or merit employment system in the executive branch of the Hawaii State government. The DHRD performs and oversees many personnel functions which include the recruitment, examination, and referral of qualified applicants to State agencies for employment consideration.

Specifically, the DHRD screens applications to determine whether the applicant has met the minimum qualification requirements (MQRs) for the class of work for which they have applied. Those applicants who meet the MQRs are then required to take a competitive written examination, and those applicants that successfully pass the competitive examination are established as "eligibles" to the appropriate eligible lists for a minimum of one year, and entered into the Applicant Information System (AIS).

Some, but not all, of the applicants posted to the list of eligibles and entered on the AIS will then be certified to the hiring agency, which will contact and interview the applicant, and make the final hiring decision.

Certification is based on an applicants examination score and on other factors such as veterans preference points, as well. However, if an applicant's examination score does not fall within a certain certification range, that applicant will not be certified for referral to the appropriate agency. In other words, a passing examination score is necessary but not sufficient to qualify for a particular vacancy.

Turning now to the specific facts of this present controversy, Chang's affidavit further discloses that complainant's application met the MQRs for the class of work of IMW I. Complainant, along with other applicants who met the MQRs, completed the competitive written examination on May 20, 1995.

On May 24, 1995, the examinations were scored and those applicants receiving passing scores, complainant among them, were established to the eligible list for IMW I and entered on the AIS. A notice dated May 26, 1995 was mailed to complainant informing him of his test results and eligibility.

On May 25, 1995, the DHS, having delegated authority to certify applicants for employment consideration, certified eligibles for employment consideration to two (2) IMW I vacancies within their department. A total of seven (7) eligibles with scores no lower than 87 were referred for consideration. Complainant, having received a score of 80, was not among the ones selected. Several other applicants had received scores ranging from 81 through 92.

Complainant contends that his examination score was not posted timely to be considered for the IMW I vacancies. That contention is based upon conversations complainant allegedly had with Ms. Joyce Tanaka, an employee with the DHS, and detailed in complainant's affidavit sworn to May 22, 1996.

From those conversations, complainant has concluded that, unlike all the other applicants, the DHRD purposely failed to post his examination score or his name to the list of eligibles on May 24, 1995. Instead, he argues that his score and name were not posted until May 25, 1995, after the DHS had accessed the AIS and certified eligibles. He further suggests that if his name had been posted on May 24, 1995, DHS would have certified him for consideration for the IMW I vacancies and eventually hired him.

First, as respondents have demonstrated, the DHRD, not the DHS, is the lead agency that handles the scoring and posting of examination scores, undercutting the reliability of the information complainant allegedly received from conversations with Ms. Tanaka, who was employed with the DHS.

Second, respondents have submitted a computer printout, attached as exhibit 4 to the Chang affidavit, clearly showing that complainant's examination score and name were posted to the list of eligibles by the DHRD on May 24, 1995. Complainant fails to address that probative evidentiary evidence.

Finally, even if complainant's allegations are taken as true and his score was not posted timely, respondents have demonstrated that he would not have been certified for consideration in any event, since his score of 80 was not within the certification range.

Based on the foregoing discussion, it is quite clear that complainant was not discriminated against because of his citizenship status. DHS selected other applicants who were more qualified for the IMW I vacancies.

Moreover, complainant has failed to provide any evidence, other than mere allegations, to refute the proposition that his application was treated expeditiously and fairly throughout the recruitment process by the DHRD and DHS.

Thus, complainant has failed to establish the third and fourth elements of his prima facie case of citizenship status discrimination and that claim is hereby dismissed with prejudice.

C. Retaliation

To establish a prima facie case of retaliation under section 1324b, complainant must show that: (1) he engaged in a protected activity; (2) respondent was aware of the protected activity; (3) he suffered adverse treatment following the protected activity; and (4) a causal connection exists between the protected activity and the adverse action. See United States v. Hotel Martha Washington Corp., 5 OCAHO 786, at 5 (1995).

Complainant's charge of retaliation arises from a previous application for an IMW I vacancy that complainant submitted to DHRD in February 1994. According to complainant, DHRD refused to accept documents he had tendered to establish work eligibility in connection with that application. He further states that because of that unlawful action, he filed a charge with OSC alleging national origin discrimination, and that the charge was dismissed "apparently because there was evidence insufficient to meet the federal standard." See complainant's complaint filed March 12, 1996.

Complainant then argues that because of this earlier OSC charge, the respondents retaliated against him by not posting his examination score or name to the list of eligibles in a timely manner in connection with his second application submitted in March 1995. Those allegations were addressed previously in connection with dispensing with complainant's citizenship status claim.

Respondents acknowledge that complainant had applied for an IMW I vacancy in February 1994 and that his application was received on March 1, 1994. They also contend that complainant was subsequently scheduled to take the competitive written examination on July 23, 1994, and that complainant failed to report to that examination.

The burden of demonstrating a prima facie case is on complainant. Therefore, complainant must initially demonstrate that he in fact engaged in protected activity by having filed a charge with OSC in 1994. In addition to mere allegations, complainant produced an unsigned copy of a letter dated May 25, 1995, addressed to OSC. In that letter, complainant states that he received two (2) letters from DHRD showing that it refused to accept his valid identification documents. For unexplained reasons, complainant has neither produced copies of those probative letters, nor furnished any other evidence that OSC investigated or adjudicated his charge.

In other words, there is no probative evidence to show that complainant engaged in protected activity other than mere allegations and an unsigned letter dated May 25, 1995. This evidence is quite clearly at the margin of reliability.

Nevertheless, even assuming that complainant had engaged in protected activity and that respondent was aware of that activity, complainant has also failed to demonstrate that he suffered adverse treatment following the protected activity and that there is a causal link between the alleged protected activity and the adverse action.

In this case, complainant contends that because he had filed a charge with OSC in 1994 against the respondents, they treated his 1995 application for an IMW I position adversely by not posting his examination score timely.

However, as previously discussed, that argument was unsupported by any evidence other than complainant's mere allegations and successfully rebutted by respondent's probative evidence, which demonstrated that his application was treated expeditiously and fairly throughout the recruitment process.

Accordingly, complainant has failed to meet his burden of demonstrating the prima facie elements of a retaliation claim under section 1324b, and that claim is ordered to be dismissed with prejudice to refiling.

Order

In view of the foregoing, complainant's March 12, 1996 complaint alleging national origin and citizenship status discrimination, and retaliation, in violation of IRCA, 8 U.S.C. §§ 1324b(a)(1) and (a)(5), is ordered to be and is dismissed with prejudice to refiling.

All motions and requests not previously disposed of are hereby denied.

Joseph E. McGuire
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 1997, I have served copies of the foregoing Order Dismissing Complaint With Prejudice to the following persons at the addresses shown, in the manner indicated:

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